ORIGINAL

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT
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STATE OF FLORIDA,

Petitioner,

v.

NOAH POWELL, III,

Respondent.

Case No. 89,964

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent, Noah Powell III, was charged by way of information with the offense of sexual battery, a life felony, in violation of 794.011(3), Florida Statutes (1993). (R. 6.) A change of plea hearing was held on August 21, 1995, at which time the defense attorney acknowledged that the Respondent scored "in a very high category" in the sentencing guidelines. However, he asked the court for a large departure from the guidelines, stating:

> The victim today in this case indicates that they have known each other for a great many years. They had a child together. She had indicated to me both over the telephone and in the deposition that it was not her intention to have this matter proceed this far.
>
> She does not want Mr. Powell to be looking at state prison. Basically, she -- at the deposition -- indicated that her main desire in this was to have some sort of restraining order to keep him away from her. What I would think is the strongest argument for a departure from the guidelines is when you have the victim herself asking the court for mercy.

(R. 47-48.) The defense attorney also argued that victims' rights legislation indicates that a sentencing court "should hear and take into consideration what victims say," and "[i]f that's appropriate for aggravated circumstances, it's appropriate for mitigating circumstances as well." (R. 54.)

The trial judge pointed out that the Respondent could be sentenced to prison and asked the victim if she had anything to say in terms of sentencing. (R. 50.) The victim stated:

> Well, I never thought it would go this far. What I was looking for was a restraining order because I feel

> that when he's around me, he's like a child, you know. It's unexplanatory. He's just there. It doesn't matter what goes on once he's around me.
>
> I don't want him bothering me. As far as our son goes, he's great with him. He can come and get him. That's as far as I'd like for it to go.

(R. 50-51.) Notably, the victim later explained her presence at the hearing: "I only came because of my pre-trial. I'm also out on ROR myself. It stated that I had to be here today. It wasn't because of him and I'm not scared of him." (R. 54.)

The state attorney strenuously objected to a departure. (R. 51-52.) He explained to the court that the circumstances of the sexual battery were aggravated in that Respondent is very jealous of the victim. He thought that she had been with someone else when he came to her house. (R. 52.) The victim talked to him to try and dispel his suspicions, but he started arguing with her. (R. 52.) The prosecutor explained that during the incident, Respondent grabbed the victim by the hair and neck, choking her with both hands. (R. 52.) He dragged her out of the kitchen, pulling her hair and pulling on her clothes. He told her, "I'm gonna kill you if I can't be with you." He then placed his legs across her neck and choked her so hard she thought she blacked out. (R. 52.)

At this point, the three-year-old son of the Respondent and the victim came to the stairs. (R. 52.) Respondent stopped attacking the victim and told their son to go back upstairs. (R.

52-53.) When Respondent began walking toward the door, the victim thought he **was** leaving and she went upstairs to her son's room. (R. 53.) However, Respondent ran after her and began hitting her and choking her in front of their three-year-old child. (R. 53.) She asked him not to do this in front of the child and ran to her bedroom. (R. 53.) Respondent followed her and began taking off her clothes. (R. 53.) She told him she did not want to have sex and that she was going to call the police. (R. 53.) Respondent told her, "I don't give a damn. I'm going to jail anyway. I might as well get my last nut." (R. 53.) The victim **was scared and afraid she would be killed.** She had scratches on her body and injury to her vagina. (R. 53.) Despite the State's objection, the judge accepted Respondent's guilty plea and ordered a PSI. (R. 57.)

The record contains a defense motion requesting appointment of an expert, Dr. Leo Cotter, who operates an out-patient program for sexual offenders, called "S.H.A.R.E." (R. 14.) However, there is no indication whether this motion was ever ruled on, or that the evaluation ever took place.

The trial court held **a** sentencing hearing on October 19, 1995. (R. 60.) Although the PSI is not included in the record, discussions during the hearing indicate that in its investigation, the Department of Corrections recommended that Respondent be sentenced to a guidelines sentence. (R. 66.) As an alternative

recommendation, the Department recommended that Respondent be sentenced to a twelve year suspended sentence, and in lieu thereof, spend two years on house arrest, followed by four years probation. (R. 70-71.)

The record contains letters from Respondent's employers to the effect that he is a valued employee who is dependable and hardworking, which were reviewed by the trial judge, (R. 15, 16; 62.)

At the sentencing hearing, Respondent told the judge that he had signed up for a program through his job which would help him deal with the anxiety "when things ain't going right." (R. 70.) The victim stated that she does not think Respondent should be incarcerated, but that he "needs some help with his temper." (R. 69.)

In addition, Respondent's two children by another woman attended the sentencing hearing. Respondent's attorney summarized the son's statement: 'He was going to say he plays with his dad. His dad is there when he needs him." (R. 68.) Respondent's daughter said, 'My dad, he's a good father. We go places and stuff." (R. 68.) Respondent's mother said she would work with him if the court would put him in a program and help him anyway that she could. (R. 68.)

The judge adjudicated Respondent guilty of sexual battery. (R. **17.)** Although Respondent scored in the range of a minimum of

99.9 months in state prison to a maximum of 166.5 months in prison, (R. 23), over objection by the State, the trial judgesentenced him to a term of twelve years imprisonment, all of which was suspended. (R. 19.) The judge then placed Respondent on community control for a period of two years, to be followed by four years probation. (R. 23.)

As one of the conditions of his community control, the court ordered Respondent to enroll and complete the S.H.A.R.E. sex offender counseling program. (R. 72.) The judge told Respondent:

> Having that 12 year suspended sentence, what that means, if you violate any of your terms you'll be looking at 12 years. You understand that sir.

(R. 72.)

To support this downward departure sentence, the judge used a check-off form to indicate two mitigating circumstances. As the first reason, the judge checked the box which states, "Defendant requires specialized treatment for addiction, mental disorder, or physical disability and the defendant is amenable to treatment." (R. 25.) The second reason, which was hand-written on the bottom of the form, reads: "Also the victim indicated need for departure." (R. 25.)

The State timely filed its notice of appeal. (R. 29.) The Second District Court of Appeal affirmed the downward departure sentence, holding that the record supported the trial court's finding that Respondent needs mental treatment and is amenable to

treatment, and declining to address the issue of whether a victim's request for leniency is a proper reason upon which to base a downward departure sentence. **State v. Powell, 22 Fla. L. Weekly D389 (Fla. 2d DCA Feb. 5, 1997).** The Second District also held that a conditional suspended sentence of the type imposed in the instant case is a valid sentencing alternative, a decision that directly conflicts with opinions out of the Fifth District Court of Appeal. Additionally, the district court certified two questions of great public importance to this Court. The State timely filed its notice to invoke the discretionary jurisdiction of this Court, and on March 10, 1997, the Court entered an order postponing a decision on jurisdiction and setting a schedule for briefs on the merits.

SUMMARY OF THE ARGUMENT

ISSUE I: The record does not support imposition of a downward departure sentence because there was no evidence presented to the trial court that Respondent is amenable to treatment and that there is a reasonable probability that such treatment will be successful. Further, the victim's request for leniency has been held to be an invalid reason for downward departure.

ISSUE II: A conditional suspended sentence is not a viable sentencing alternative as it is not authorized either by a decision of this Court or by statute.

ISSUE III: There is no support either in case law or in the statutes to support the position that a trial court may suspend entirely the period of incarceration imposed. Therefore, the first question certified by the Second District should be answered in the negative.

ISSUE IV: The second certified question should also be answered in the negative because it leaves open the possibility that a suspended period of incarceration is unconnected to any sort of state supervision.

ARGUMENT

ISSUE I

WHETHER THE RECORD SUPPORTS A FINDING THAT RESPONDENT IS AMENABLE TO TREATMENT AND THERE IS A REASONABLE POSSIBILITY THAT SUCH TREATMENT WILL BE SUCCESSFUL?

At sentencing, the trial court found that a departure sentence was warranted for two reasons: (1) Respondent needed mental treatment and is amenable to treatment and (2) the victim indicated a need for departure. Because it found that the record supported the first reason, the Second District declined to reach the validity of the second reason for departure. Petitioner maintains that neither reason supports the departure sentence in the instant case.

BY statute, the level of proof necessary to support a departure sentence is a preponderance of the evidence. See §§ 921.001(4)(a)6 and 921.001(6), Fla. Stat. (1993). Although this case does not involve substance abuse treatment, Petitioner suggests that the situation at bar may be fairly analogized to those cases in which a downward departure sentence is predicated on the defendant's need for substance abuse treatment. See State v. Krueger, 664 So. 2d 26, 27 (Fla. 3d DCA 1995) (although Herrin involved a drug dependency, its reasoning is applicable to a situation where trial court imposes a downward departure sentence because "defendant requires specialized treatment.").

In Herrin v. State, 568 So. 2d 920 (Fla. 1990), this Court

stated that the mere fact of **a** defendant's substance abuse alone cannot justify a downward departure from the guidelines, and explained:

> There must also be a finding based upon competent substantial evidence that if the defendant's sentence is reduced in order to permit treatment for the dependency, there is a reasonable possibility that such treatment will be successful. Expert testimony on the subject would be helpful but is not mandatory where there is other evidence to support the conclusion.

In discussing the type of evidence needed to support the trial court's finding that departure is warranted based on a substance abuse problem, the Third District has said:

> Surely, the perfunctory, unexplained word of the defendant below facing a potential prison sentence does not, without more, constitute proof by **a** "preponderance of the evidence," §921.001(4)(a)(6), Fla. Stat. (1993), that there is **a** reasonable possibility that drug treatment will break his admitted five year, daily cocaine habit.

State v. Gordon, 645 So. 2d 140, 142 (Fla. 3d DCA 1994), rev. denied, 652 So. 2d 816 (Fla. 1995). That court went on to say that where the purpose of deviating from the guidelines is so the defendant can obtain treatment

> it would seem essential either that the defendant already be in the program as was true in **Herrin** or that there be an evaluation by a representative of the program indicating that the defendant will be accepted in the program as a suitable candidate for drug treatment.

Id.

What is clear from the above cases, is that the sentencing court should be looking for more than the now-repentant defendant's

self-serving claim that he "wants to turn his life around." **See also State v. Cohen, 667 So. 2d 438 (Fla. 2d DCA 1996)** (downward departure sentence not justified where there was no evidence to support the trial court's finding that the defendant was amenable to rehabilitation through substance addiction treatment); **State v. Gronongor, 615 So. 2d 869 (Fla. 4th DCA 1993)** (error for trial court to impose downward departure sentence where judge did not find the defendant **was** amenable to rehabilitation),

It is the absence of evidence or other specifics which distinguishes this case from cases such **as State v. Twelves, 463 So. 2d 493 (Fla. 2d DCA 1985)**, in which the Second District upheld a departure based on the defendant's need for specialized treatment. In Twelves, the trial court had before it expert evidence that the defendant suffered from Post-Traumatic Stress Disorder which could be treated by means of the specific, recognized rehabilitation programs at PAR and the Bay Pines Vietnam Veterans Outreach Program. In addition, the defendant's family, friends, relatives and employers stated that they would assist the defendant in his rehabilitation efforts. Twelves, 463 So. **2d at 493-94.** Thus, the court approved a departure sentence based on the expert testimony together with the available recognized programs in which the defendant's specific illness could be treated and the supportive environment to assist in the process of rehabilitation,

In the case **at** bar, the information before the trial court

simply did not rise to that level. Respondent's mother said she would support his efforts in any program. Although his employers sent letters stating that he was a valued employee, they did not address or acknowledge that Respondent has a problem or extend any offer of help. It is interesting to note that the victim stated that she was through with Respondent and just wanted him to leave her alone, but Respondent's statement to the court shows that he was still clinging to the idea that they would get back together and be a family. (R. 51, 55; 70.)

Respondent stated that he planned to attend a program to help him cope with anxiety; however, he never mentioned out-patient sex offender counseling or anger management counseling. There **was** no evidence presented that Respondent was amenable to sex offender treatment other than some rather general, self-serving statements made at the sentencing hearing. His attorney said that Respondent would welcome the alternative recommendation in the PSI, which included out-patient sex offender treatment. Although Respondent had previously made a motion to have an expert evaluation by Dr. Leo Cotter, who operates an out-patient program for sex offenders (R. 14), the record does not show whether the evaluation was performed, nor does it show the results of the evaluation. Most importantly, the record is devoid of any indication that the Respondent would be accepted into the S.H.A.R.E. program operated by Dr. Cotter, cr that Respondent, specifically, could be helped

through that program. Thus, Petitioner maintains that the trial judge erred in departing from the guidelines in the absence of any evidence to show Respondent's amenability to treatment or that such treatment would likely be successful in rehabilitating Respondent.

Likewise, the second reason given by the trial court does not support a downward departure in this case. This reason for departure **was** written in by the trial judge, and states, "Also the victim indicated need for departure." (R. 25) Petitioner contends that this is not a permissible reason for departure.

Respondent's attorney argued below that victims' rights legislation provides **a** basis for a sentencing court to consider what the victims say with regard to aggravating and mitigating circumstances. **Section 921.143, Florida Statutes (1993)**, provides that victims may make an oral or written statement to the sentencing judge. However, subsection (2) of that statute limits the content of such a statement "solely to the facts of the **case** and the extent of any harm, including social, psychological, or physical harm, financial losses, and loss of earnings directly or indirectly resulting from the crime. . . ." **§ 921.143(2), Fla. Stat. (1993).** Thus, the victim's right to speak extends to victim injury and impact. Noticeably absent from this subsection is any mention that the sentencing court should solicit a recommendation by the victim as to what sentence should be imposed. This is certainly understandable given the fact that sentencing guidelines

have been established which take into account many things a victim most probably is not aware of, such as the defendant's prior history, the severity ranking of the crime, etc.

Petitioner would urge this Court to hold that the victim's wishes as to the propriety of a particular sentence is not an appropriate ground upon which to base a departure sentence, as has the Fifth District in **State v. Usserv, 543 So. 2d 457 (Fla. 5th DCA), rev. denied,** 551 So. **2d 464 (Fla. 1989)** (the victim's request for departure was not a valid reason for the trial court to impose a downward departure sentence), and **State v. White, 532 So. 2d 1083, 1084 (Fla. 5th DCA 1988)** ("The 'forgiving attitude' of the victim's mother is irrelevant to determination of a proper sentence.").

In its opinion, the district court noted the potential difficulties associated with relying on this as a reason for departure, especially in a domestic violence case such as this:

> In the context of domestic violence, the victim may have conflicting emotions. A defendant and other family members could easily pressure the victim to request leniency. We would not wish to encourage trial courts to rely upon this reason for a departure sentence in a case involving domestic violence.

State v. Powell, 22 Fla. L. Weekly D389 (Fla. 2d DCA Feb. 5, 1997). Because there is no statutory or logical justification for relying on a victim's wishes regarding the sentence to be imposed on a defendant, the State urges this Court to hold that this second reason does not provide a basis for a downward departure sentence

in the instant case.

The trial court did not provide a legally justifiable reason for departing from the guidelines; therefore, it was an abuse of discretion to impose a downward departure sentence. Consequently, the sentence should have been reversed and the case remanded for resentencing within the guidelines since the trial court knew it was imposing a departure sentence. **State v. Betancourt, 552 So. 2d 1107 (Fla. 1989).**

ISSUE II

IS A CONDITIONAL SUSPENDED SENTENCE A VIABLE SENTENCING ALTERNATIVE?

Even if this Court finds at least one valid departure reason, the sentence should be reversed because the trial court used a sentencing alternative that is not authorized. Petitioner asserts that the Second District erred by affirming this sentencing scheme, a decision which directly conflicts with numerous decisions out of the Fifth District Court of Appeal.

The trial court sentenced Respondent to twelve years incarceration, suspended all twelve years, and placed him on community control for two years followed by four years probation. Split sentences are viable sentencing alternatives in Florida, § 948.01, Fla. Stat. (1993). However, conditional split sentences of the type imposed in the case at bar are not authorized by statute, nor are they one of the sentencing alternatives recognized by this Court in **Poore v. State, 531 So. 2d 161 (Fla. 1988)**. "Unless there is specific statutory authority to impose a sentence, it cannot stand." **Rozmestor v. State, 381 So. 2d 324, 326 (Fla. 5th DCA 1980)**. Compare **State v. McKendry, 614 So. 2d 1158, (Fla. 4th DCA 1993), aff'd, 64.1 So. 2d 45 (Fla. 1994)** (legislature has plenary power to prescribe punishment for criminal offenses which "cannot be abrogated by the courts in the guise of fashioning an equitable sentence. . . .").

The State urges this Court to adopt the rationale of **Bryant v.**

State, 591 So. 2d 1102 (Fla. 5th DCA 1992), and its progeny, and find that such sentences are not permissible. In Bryant v. State, 591 So. 2d 1102 (Fla. 5th DCA 1992), the defendant was sentenced to concurrent terms of ten years incarceration, suspended upon successful completion of two years in community control. When he appealed the sentence imposed following his violation of community control, the district court rejected the state's argument that the judge had to sentence the defendant to the balance of the suspended term since the defendant had initially received "a true split sentence" under Poore v. State, 531 So. 2d 161 (Fla. 1988).

The court held that the original sentence was an illegal, unauthorized, alternative sentence, which it called "a conditional suspended sentence." Bryant, 591 so. 2d at 1103. The court explained that a true split sentence is "a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for *that suspended portion.*" Id. [emphasis in original]

By way of example, the court stated that a true split sentence would be where the defendant was sentenced to ten years imprisonment, but he was to be released after three years and serve the remaining seven years on probation. Bryant, 591 So. 2d at 1103. In Bryant, however, the ten year prison term was suspended, with no probation, on the condition that the defendant successfully complete two years of community control. If the defendant did

successfully complete the community control portion, that would satisfy the entire sentence. Id.

According to the Fifth District, a trial judge is limited to imposing one of the five sentencing alternatives set out in Poore v. State, 531 So. 2d 161 (Fla. 1988), which are: (1) a period of confinement; (2) a true split sentence, consisting of a period of confinement, which is suspended and the defendant is placed on probation for the suspended portion; (3) a probationary split sentence, consisting of a period of confinement followed by a period of probation; (4) a period of probation preceded by a period of confinement imposed as a special condition; and (5) straight probation. Since a conditional suspended sentence is not one of those alternatives, it is an illegal sentence. Therefore, the Bryant court reversed and remanded the case for resentencing.

The Fifth District has repeatedly held such sentences to be invalid, most recently, in State v. McEachern, 22 Fla. L. Weekly D323 (Fla. 5th DCA Jan. 31, 1997)[1], the case with which the Second District cited direct conflict. See also Warrington v. State, 660 So. 2d 385 (Fla. 5th DCA 1995) (sentence of five years incarceration

[1]The Second District certified direct conflict with the original opinion in this case, which was originally found at 21 Fla. L. Weekly D2453 (Fla. 5th DCA Nov. 15, 1996). Although that opinion was substantially changed at 22 Fla. L. Weekly D323 (Fla. 5th DCA Jan. 31, 1997), the holding remained the same: this type of conditional suspended sentence is illegal as it does not conform to the sentencing alternatives set out in Poore v. State, 531 So. 2d 161 (Fla. 1988).

suspended on condition of successful completion of two years community control followed by three years probation, and twelve years incarceration suspended on condition of successful completion of two years community control followed by thirteen years probation, was illegal, conditional suspended and alternative sentence); and **Bell v. State,** 651 So. **2d 237 (Fla. 5th DCA** 1995) (life sentence suspended on condition of successful completion of thirty years probation is illegal since it is not one of the alternatives set out in **Poore,** nor is it authorized by the legislature in chapter 948, Florida Statutes).

Appellant urges this Court to adopt the rule that the trial court is limited to imposing either a sentence authorized by statute or one of the sentencing alternatives set out in **Poore.** Such a bright-line rule can only aid the trial court by removing some of the'uncertainty associated with the carrying out of its duties in this ever-changing area of the law.

There is authority for the proposition that such an unauthorized sentence should be reversed. For example, in **King v. State,** 681 so. **2d 1136 (Fla. 1996),** this Court explained that a hybrid sentence consisting of incarceration without habitual offender status, followed by probation as an habitual offender, is not authorized by section 775.084, and in fact, such a hybrid sentence is inconsistent with the plain language of the statute, The Court rejected any inference that this type of hybrid sentence

is an "illegal sentence," where it does not exceed the statutory maximum. However, the Court reversed the sentence anyway, finding that it was not authorized, and explained:

> This distinction between an unauthorized and an illegal sentence does not change the result for King: absent a valid agreement to the contrary, the judge had no authority to impose this hybrid sentence and it must be reversed.

King, 681 So. 2d at 1140.

As in **King**, the conditional suspended sentence imposed in the instant case is not authorized by statute, nor was it agreed to or suggested by the prosecutor. The sentence structure was the alternative recommendation by the Department of Corrections in the presentence investigation. Therefore, the sentence should be reversed, and the case remanded to the trial court for imposition of an authorized sentence.

ISSUE III

IF THERE EXISTS A VALID REASON FOR A DOWNWARD DEPARTURE, MAY A TRIAL COURT IMPOSE A TRUE SPLIT SENTENCE IN WHICH THE ENTIRE PERIOD OF INCARCERATION IS SUSPENDED?'

The first question certified by the Second District Court of Appeal is closely related to the second issue of whether the trial court may impose **a** conditional split sentence.

Focusing on the language of the statute, the Second District held below that a trial court may sentence a defendant to a period of incarceration and then suspend that entire period, holding it over the defendant's head as "a sword of Damocles." **State v. Powell, 22 Fla. L. Weekly D389 (Fla. 2d DCA Feb. 5, 1997). Section 948.01(6), Florida Statutes (1993),** provides in pertinent part that a trial court may impose a split sentence

> whereby the defendant is to be placed on probation . . . upon completion of any specified period of such sentence which may include a term of years or less. In such case, the court shall stay and withhold the imposition of the remainder of sentence . . . and direct that the defendant be placed upon probation or community control after serving such period as may be imposed **by** the court. The period of probation or community control shall commence immediately upon the release of the defendant from incarceration, whether by sarole or gain-time allowances. [emphasis added]

§ 948.01(6), Fla. Stat. (1993). Petitioner maintains that the clear import of the underlined portion of the statute is that the defendant will have completed some term of incarceration. Although

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[2]This is the first question certified by the district court.

it could be argued that the section refers **also** to incarceration in the county jail prior to being sentenced to state prison, Petitioner suggests that the references to parole and gain-time, which are not applicable to jail time of **a** person awaiting trial and sentencing, negate such an inference.

There is conflict among the district courts of appeal as to whether this type of suspended sentence is permitted, with the Fifth District holding that such a sentence is not authorized, and the First and Second Districts holding that the entirely suspended prison sentence is a 'true split sentence" under **Poore**. Compare **State v. Davis,** 657 **So. 2d** 1224 **(Fla. 5th DCA 1995),** and **State v. Conte, 650 So. 2d 192 (Fla. 5th DCA), rev. denied, 659 So. 2d 270 (Fla. 1995)**, with **Helton v. State, 611 So. 2d 1323 (Fla. 1st DCA 1993)**, and **Silva v. State,** 602 So. **2d 694 (Fla. 2d DCA 1992).**

In **Poore,** the court described a "true split sentence" **as a** "total period of confinement with a portion of the confinement period suspended." **Poore v. State, 531 so. 2d 161 (Fla. 1988).** Petitioner asserts that a common understanding of the plain language of the statute dictates that something less than the whole sentence will be suspended since the statute provides merely that a portion of the period of incarceration may be suspended. Among the definitions in Webster's Dictionary, one finds "portion" defined as "a part of a whole," and 'a limited amount or quantity." **Webster's Third New International Dictionary 1768 (1986).** Thus,

Petitioner suggests that the statutory language itself does not lend itself to the interpretation made by the Second District

There is no statutory support nor case law which supports the view taken by the Second District. Thus, Petitioner requests that this Court reject the view that a trial court **may** suspend the entire incarcerative portion of a sentence, and answer the first certified question in the negative.

ISSUE IV

MAY A TRIAL COURT IMPOSE A TRUE SPLIT SENTENCE IN WHICH THE PERIOD OF COMMUNITY CONTROL AND/OR PROBATION IS SHORTER THAN THE SUSPENDED PORTION OF INCARCERATION?

In another question that is closely related to the second issue in this appeal, the second question certified by the district court concerns the propriety of a sentence in which the trial court imposes a period of probation, suspends some portion or all of it, and places the defendant on probation and/or community control for a period of time less than the period of incarceration which was suspended.

By virtue of its decision in the instant case, the district court has approved this practice. However, Petitioner contends that this is error.

In **Poore v. State, 531 SO. 2d 161 (Fla. 19881,** this Court explained that a 'true split sentence" is one in which the defendant is sentenced to "a total period of confinement with a portion of the confinement period suspended and the defendant placed on probation for that suspension." [emphasis supplied] Petitioner contends that the Second District has disregarded the plain language of **Poore** by holding that the probationary period does not have to be equal to the portion of incarceration that was suspended.

The Second District reasoned that this result was permissible because there are different purposes for imposing incarceration and

probation; therefore, "it is not obvious why the length of probation in a true split sentence must always equal the suspended portion of the sentence of incarceration." However, given the purpose underlying the sentencing guidelines, i.e., to standardize sentencing in Florida, one might also observe that it is not obvious why the length of probation in a true split sentence should not always equal the suspended portion of incarceration. In fact, this Court has said that "sentencing alternatives should not be used to thwart the guidelines." **Disbrow v. State, 642 So. 2d 740 (Fla. 1994).**

There is an additional problem with this type of sentence. Although it can be inferred from the sentence imposed here that it was to be a "conditional suspended sentence," and that the balance of the incarcerative portion beyond the combined six years community control and probation will be extinguished upon Respondent's satisfactory completion of supervision by the Department of Corrections, this is not explicitly stated in the sentencing documents. Therefore, since the suspended portion of Respondent's sentence spans twelve years, and the community control and probation periods cover only six years, this leaves six years of suspended incarceration which are apparently unconnected to either probation or community control. This Court has disapproved this type of suspended sentence, and in **Helton v. State, 106 So. 2d 79 (Fla. 1958)**, said that

> the power to suspend the imposition of sentence upon a convicted criminal can be exercised by a trial judge only as an incident to wrobation under Ch. 948, supra.

Helton, 106 So. 2d at 80. Thus, under **Helton**, it would appear that a trial court may not impose a suspended sentence unconnected to any probation or community control supervision by the state.

As discussed above, the trial court in this **case** formulated a sort of hybrid sentence, which is not a true split sentence or a probationary split sentence **as** defined by **Poore.** It is true that **section 948.01(11), Florida Statutes (1995)**, expressly authorizes a reverse split sentence, which is similar to the sentence imposed in this case, as pointed out by the Second District in its opinion. However, this is even more reason to prohibit **a** trial court from inventing such a hybrid sentence, since it can accomplish much the same thing by a statutorily authorized alternative.

The Second District appears to approve the conditional suspended sentence as a means to avoid a perceived jurisdictional problem it finds in the reverse split sentence. **See Fla. R. Crim. P.** 3.800 **(b)** (providing that a trial court may only reduce a sentence within 60 days of imposition or certain other circumstances not relevant here). However, Petitioner would point out that the same jurisdictional problem would exist with regard to the conditional suspended sentence since the trial court would need to modify the defendant's sentence by canceling the balance of the suspended sentence upon completion of probation and/or community control

portion of the sentence--which in the instant case could be as late as six years from the original sentencing date. In fact, the jurisdictional problem is even more pronounced in the conditional suspended sentence imposed in the instant case than in the case of the reverse split, since this type of sentence is not statutorily authorized, and no other provision in the statutes authorizes the trial court to make such a modification years after the original sentence was imposed. Therefore, contrary to the Second District's assertion in its opinion, this type of sentence does not circumvent the potential jurisdictional problem under rule 3.800(b).

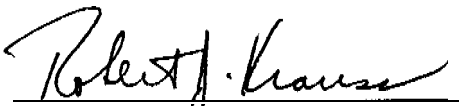
In conclusion, Petitioner requests that this Court answer the second certified question in the negative, and hold that when the incarcerative portion of a sentence is suspended and a defendant is placed on probation or community control, the length of the term of probation or community control must equal the period of suspended incarceration.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that this Honorable Court answer the certified questions in the negative and find that a conditional suspended sentence is not a viable sentencing alternative in Florida. In addition, Petitioner asks the Court to find that the record does not support imposition of a downward departure sentence and order that a guidelines sentence be imposed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Allyn Giambalvo, Assistant Public Defender, Office of the Public Defender-Appeals, Pinellas Criminal Justice Center, 14250 49th Street North, Clearwater, Florida 34622, this 4th day of April, 1997.

Deborah F. Hogge

COUNSEL FOR PETITIONER